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NO. 34025-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Appellent,

v.

RANDALL J. PATTON,
Respondent.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAMANIA COUNTY

The Honorable E. THOMPSON REYNOLDS, Judge

BRIEF OF RESPONDENT

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I. APPELANT'S ASSIGNMENTS OF ERROR

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2. THAT THE TRIAL COURT ERRED BY CONCLUSING AS A MATTER OF LAW THAT THE SEARCH OF THE RESPONDENT'S AUTOMOBILE WAS NOT INCIDENT TO THE RESPONDENT'S ARREST AFTER THE RESPONDENT WAS ARRESTED INSIDE AN ENCLOSED TRAILER.

3. THAT THE TRIAL COURT ERRED BY CONCLUSING AS A MATTER OF LAW THAT THE EVIDENCE SEIZED FROM THE RESPONDENT'S AUTOMOBILE BE SUPPRESSED.

4. THAT THE TRIAL COURT ERRED BY ENTERING AN ORDER OF SUPPRESSION AND DISMISSAL WITH PREJUDICE OF COUNT I ON THE INFORMATION.

II. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

a. What is the standard of review of conclusions of law in a CrR 3.6 suppression order?

b. Was the Respondent seized and controlled when law enforcement, not identifying themselves as such to the Respondent, first confronted him as he stood outside his automobile with his head still inside of his automobile, on a pitch black night?

c. Did the arrest or seizure of the Respondent's person have anything at all to do with the Respondent's automobile in order to justify its search?

d. Is there a trend of searching automobiles of persons who have an outstanding arrest warrant, such that this Court should address?

III. STATEMENT OF THE CASE

Both Parties stipulated to a set of facts set out in CP 5-9 and 10-14, and such facts were incorporated by the trial court in a written Findings of Fact found in CP 15-19.

No live testimony was offered during the CrR 3.6 suppression hearing.

According to stipulated facts at CP 15-19 page 16 lines 11-12: it was so dark that Deputy Converse didn't see anybody at the Respondent's automobile until he noticed that the dome light turned on. It was that dark, in city limits.

The Deputy then decided to apprehend the Respondent without waiting for backup. CP 16 lines 14-15; CP 11 lines 5-21.

Seeing the Respondent at the automobile, Deputy Converse executed a cavalier confrontation, blocking the Respondent's vehicle, headlights and

spotting lights ablaze, yelling "place you hands behind your back, you're under arrest!" CP 16 lines 11-25.

After apprehending the Respondent inside of the "barricaded" trailer and then placing him into Deputy Converse's custody (CP 12 lines 3-8), Sergeant Robison took the liberty to search the Respondent's automobile. CP 12 lines 11-13; CP 17 lines 10-15.

Following the CrR 3.6 hearing, the trial court entered a Findings of Fact and Conclusions of Law Re Motion to Suppress Evidence. CP 15-19.

The Appellant utterly failed to assign error to these findings of fact in their Opening Brief.

IV. SUMMARY OF ARGUMENT

The trial court found that the Respondent was arrested inside of a barricaded trailer. Because the Appellant does not challenge this finding, Appellant's argument that the Respondent was arrested at the side of his automobile to justify

its search, necessarily fails. And in any case, a search of the automobile would not have been justified under the facts of the case.

V. ARGUMENT

A. The standard of review of conclusions of law in a CrR 3.6 suppression order is de novo.

Findings of fact following a suppression hearing which are not challenged on appeal are verities on appeal. State v. Christian, 95 Wn.2d 655, 628 P.2d 806 (1981), citing Riley v. Rhay, 76 Wn.2d 32, 454 P.2d 820, *Cert. Denied*, 396 U.S. 972, 24 L.Ed.2d 440, 90 S.Ct. 461 (1969).

Since the Appellant does not challenge the trial court's findings of fact that the Respondent was not arrested until law enforcement entered the trailer and arrested him, such a finding is binding upon the Appellate Court. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Arguing at this juncture that "as a matter of law," that the Respondent was arrested as he stood

outside next to his automobile, defeats the very principles of finality as to the findings of fact not challenged on appeal.

Conclusions of law entered by a trial court in support of a ruling on a motion to suppress evidence are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

B. The Respondent was neither seized nor controlled when (1) the Deputy rushed him (2) during a pitch black night (3) while the Respondent stood alongside his automobile with only his head still inside of the automobile, (4) and the Deputy utterly failed to identify himself to the Respondent as police, thus (5) causing the Respondent to become disorientated, startled and concerned to the point that (6) he ran for safety (7) into a "barricaded" trailer (8) which was several feet away, (9) wherein he was subsequently seized (10) several minutes later by other deputies.

During his brazen confrontation, Deputy Converse failed to announce that he is even associated with law enforcement. For all the Respondent knows, Deputy Converse is about to rob him.

The record is utterly wanting of the very

important fact of announcement by law enforcement, especially under the unique and potentially explosive circumstances of this case.

Why this announcement is important: (1) the Respondent was startled and blinded by the lights and (2) this is an age of violent car jackings and roadside robberies, so the fact that the startled Respondent darted for safety, is not at all surprising under these circumstances.

But more importantly, nowhere does the record reflect that the Respondent in fact recognized the presence of law enforcement when Deputy Converse made that spirited confront.

The very definition of arrest supports the trial court's findings of fact and conclusion of law under these circumstances:

A suspect is under arrest "from the moment they were not, and knew they were not, free to go." State v. McIntyre, 92 Wn.2d 620, 623, 600 P.2d 1009 (1979), following State v. Byers, 88 Wn.2d 1, 5, 559 P.2d 1334 (1977), *reversed on*

other grounds, State v. Williams, 102 Wn.2d 733, 741, 689 P.2d 1065 (1984).

Williams held that Byers "blurs the distinction between an arrest and a TERRY stop", Williams at 742. This partial overruling does not appear to affect the application of Byers to the present case.

"Whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person." Terry v. Ohio, 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

"A person is "seized" within the meaning of the Fourth Amendment only when, by means of physical force or a show of authority, his freedom of movement is restrained … There is a "seizure" when, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," [*Emphasis added*] State v. Mendez, 137 Wn.2d 208, 221, 970 P.2d 722 (1999), *citations omitted.*

The Appellant failed to demonstrate and the

trial court did not find that the Respondent was aware of the "show of authority" by a true in-fact law enforcement official. Deputy Converse did not announce who he was or what he was.

Although the trend in the execution of search warrants seems to be that law enforcement officials no longer have to knock and announce (due to a recent U.S. Supreme Court holding, case name/citation unknown at time this Responsive Brief was published), the phenomenon will become the norm: suspects will assume that somebody is acting the part of a law enforcement official, just as an identity thieve takes on the appearance of their victim's identity.

So how can one distinguish law enforcement from criminals, if this trend is allowed to take root?

Appellant utterly failed to establish as a matter of fact, that the Respondent was in fact cognizant of the identity of Deputy Converse as a law enforcement official, and based upon the

contents of the offered facts (CP 5-9 and 10-14), this in fact never took place.

As such, the trial judge did not make an erroneous conclusion of law that the Respondent was not seized or arrested at or near the Respondent's automobile, since he was not arrested until he was so arrested inside of a "barricaded" trailer.

C. The arrest and seizure of the Respondent's person inside of a "barricaded" trailer had absolutely nothing to do with the Respondent's automobile, in order to justify its search without a warrant.

The Respondent's automobile had nothing to do with the probable cause to arrest the Respondent on March 19, 2005: there was already a warrant issued to arrest the Respondent. CP 16.

The fact that an automobile having some connection to the probable cause to arrest a suspect is a necessary inquiry to whether the automobile is legitimately searched incident to arrest. State v. Fore, 56 Wn.App. 339, 345, 783

P.2d 626 (1989).

As to that "bright-line" rule found in State v. Strode, 106 Wn.2d 144, 720 P.2d 436 (1986), it has been construed narrowly, Fore at 345, and it is not the panacea that the Appellant proffers it to be.

In Fore, the suspects were occupants of the vehicles, just prior to arrest, and they were arrested for selling drugs from these vehicles, which was all temporally related to their apprehension while they were occupying their automobiles. Id. at 341-345.

In Appellant's case, the Respondent was at best observed rummaging in the front area of his automobile while he stood outside the vehicle with his feet planted on the Earth, and merely had his head still in the automobile, when Deputy Converse simultaneously blinded him and yelled at him during a pitch black night. CP 16.

Of course, the arrest took place several minutes later and many feet away and inside of a

"barricaded" trailer. CP 17.

Unless the Respondent was caught doing something illegal with the Respondent's automobile (for example: robbing a store; a kidnapped victim in the trunk; being involved in a hit and run; eluding) or unless contraband was observed "in plain view," there was absolutely no justification to conduct a warrantless search of the Respondent's automobile.

Nowhere does the trial court find that the Respondent even posed a danger to the law enforcement officers, or that the vehicle was parked along a public roadway (justifying an inventory search, etcetera).

D. There seems to be a trend of bootstrapping the automatic searches automobiles of persons who have an outstanding arrest warrant, and this Court should address that trend for future guidance of law enforcement in this State.

There seems to be a trend in cases where, when the police know that there is a warrant to

arrest a suspect, they then use the ensuing warrant for arrest to bootstrap a search of the automobile and its contents.

This is being used in a pre-textual manner, and the following published case-laws demonstrate this trend:

State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983), involved a prior issued arrest warrant; the arrest for which was used to justify a search of the arrestee's vehicle.

State v. Porter, 102 Wn.App. 327, 6 P.3d 1245 (II, 2000), involved a prior issued arrest warrant; the arrest warrant was used to justify Porter's arrest, not some other independent behavior; his subsequent arrest for that outstanding arrest warrant was used to justify a search of the arrestee's vehicle.

State v. Jones, 146 Wn.2d 328, 45 P.3d 1062 (2002), involved a prior issued arrest warrant; the arrest for which was used to justify a search of the arrestee's vehicle. In Jones, a

passenger's purse was searched and contraband found therein was used to charge Jones with possession of a firearm.

State v. Rathbun, 124 Wn.App. 372, 101 P.3d 119 (II, 2004), also involved a prior issued arrest warrant, the arrest for which was used to justify a search of the arrestee's vehicle.

Rathbun is very similar "on all four corners" to the Respondent's case, RP 18.

The only "wrinkle", RP 18 line 22, is "whether or not Mr. Patton was under arrest at the time he was next to the vehicle"; RP 21 lines 19-20.

That factual issue having been established by the trial court and not challenged by the Appellant, binds the Appellant to that finding.

In State v. Boyce, 52 Wn.App. 274, 758 P.2d 1017 (1988), Boyce was driving erratically and was thus pulled over, and was arrested for an outstanding traffic warrant.

Evidence so seized was suppressed in all of

these cases.

The issue that this Court should address is whether there is a trend where previously issued arrest warrants are used pretextually to justify searches of automobiles. In each case cited above, there were justifications that led to suppression of the evidence: temporal or physical proximity to the vehicle searched lacking; lack of officer safety; somebody else's purse, and so forth:

However, if this many cases get published, then how many more cases are there in the court system where similar pretextual arrests followed by searches, have been or are executed?

This trend should be resolved with some guidance from this Court.

Such guidance would not prevent otherwise legitimate searches, where a "jealously drawn exception" does in fact exist.

VI. CONCLUSION

The Respondent's person was seized and he was arrested when he was found and detained inside of a "barricaded" trailer. Because of that, there was no justification to search the Respondent's automobile without a search warrant first being issued by a court of law.

There being no dispute as to the factual findings of the trial court by the Appellants, the conclusions of law were reasonably drawn by the trial court's reflections of those binding facts.

The evidence discovered during the warrantless search should remain suppressed, and Count I should remain dismissed.

Respondent should be awarded his reasonable attorney fees and costs for Responding to this appeal.

Respectfully submitted this 20th day of November, 2006.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. RANDALL J. PATTON, Respondent.	No. 34025-9-II CERTIFICATE OF SERVICE OF BRIEF OF RESPONDENT

I certify and affirm under penalty of perjury under the laws of the State of Washington that I served a copy of the Brief of Respondent upon each of the foregoing by placing said copy into a sealed envelope and depositing said envelope into the United States Mails, postage prepaid first class and addressed to:

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Done November 20, 2006, at Portland, Oregon.

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